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Chan Yung Sheng v Zakaria bin Awang

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HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCVC-39–04 OF 2018
DARRYL GOON JC
16 JANUARY 2019

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Tort — Damages — Quantum of damages — Appeal against quantum of damages awarded by sessions court — Discount for contingencies, vicissitudes of life and accelerated payment — Whether discount ought to be given

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This was an appeal against the quantum of damages awarded by the sessions court, in which this appeal was confined to the award in respect of a prosthesis for the respondent. The other sums were not challenged. The facts of the case was that while the respondent was riding on his motorcycle, had met with an accident with a motorcar driven by the appellant, which resulted in the respondent suffering severe injuries resulting in his left leg being amputated above the knee. Two experts were called to testify as to the appropriate prosthesis. One from each side. SP4 testified that the respondent fell within a category 3 amputee, it was recommended that the appellant used a trans-femoral prosthesis and SP4 further recommended the Endolite Linx which had similar features as how the biological knee and foot coordinate with the brain. When quantified the total amount to cater for the recommended prosthesis by SP4 was RM1,364,001.64 inclusive of goods and services tax. SD1 also testified that the respondent fell within the category 3 amputee and prescribed the Ossur Total Knee 2000 which was also a trans-femoral prosthetic which would cost only RM225,730 without GST. SD1 further testified that Endolite Linx was not suitable for the respondent having regard to his activity level and hypertension which can cause rashes and give rise to fungal infection on the skin, and would not be suitable to enable the respondent to return to his previous job which would require him to climb ladders, work outdoor in warm or hot temperate and have regular contact with water.

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Held, allowing the appellant's appeal with costs of RM8,000 and reducing the amount awarded by the sessions court judge by 1/3 in respect of contingencies, vicissitudes of life and accelerated payment:

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(1) The finding of the learned sessions court judge in favour of the Endolite Linx was a finding of fact. The court would not presume to belittle the advantage of the learned sessions court judge had in having heard the testimonies of both experts and having heard them both testify. Further the learned sessions court judge was not impressed with the credibility of

A one of the experts. The court did not find any ground disclosed that would warrant interference with the finding of the learned sessions court judge that the Endolite Linx prosthetic was the correct and appropriate prosthetic for the respondent (see paras 15 & 19).

B (2) The respondent was in his mid-fifties and in the sum awarded included the consideration of the cost of several further replacement of component parts for a period of 16 years and also considered inflation, rising costs and the fall of value of money which were in fact factors to be considered when assessing the quantum of damages to be awarded. However there C was no reason that discount should not be afforded. In the experience of common law, it was a recognition that unforeseen events do occur in life and they may occur such as would result in an over compensation. The amount awarded was not in respect of a claim under s 7 of the Civil Law Act and there was no reason why a discount for contingencies, D vicissitudes of life and accelerated payment may not be applied. The reasons proffered by the learned sessions court judge did not in the circumstances of this case justify a waiver of the well-established practice of affording a discount for contingencies, vicissitudes of life and accelerated payment (see paras 22–23, 26 & 29).

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[Bahasa Malaysia summary

Ini merupakan satu rayuan terhadap jumlah kerugian yang perlu dibayar seperti mana diperintahkan oleh mahkamah sesyen, yang mana rayuan ini terhad terhadap award melibatkan kaki palsu untuk responden. Jumlah lain F tidak dicabar. Fakta kes adalah semasa responden membonceng motorsikalnya, telah terlibat dalam satu kemalangan dengan satu kereta yang dipandu oleh peraya yang menyebabkan responden mengalami kecederaan serius yang menyebabkan kaki kirinya dipotong daripada bahagian atas lutut. Dua pakar telah dipanggil untuk memberi keterangan berkenaan dengan kaki palsu yang G sesuai. Satu daripada setiap pihak. SP4 memberikan keterangan bahawa responden tergolong dalam kategori 3 orang yang menjalani amputasi, ianya disyorkan bahawa perayu menggunakan kaki palsu trans-femoral dan SP4 mengesyorkan kaki palsu Endolite Linx yang mempunyai ciri sama dengan lutut sebenar dan koordinasi antara kaki dan otak. Apabila dijumlahkan H jumlah keseluruhan untuk kaki palsu tersebut adalah RM1,364,001.64 termasuk cukai GST. SD1 turut memberi keterangan bahawa responden tergolong dalam kategori 3 orang yang menjalani amputasi dan mengesyorkan Ossur Total Knee 2000 yang juga merupakan kaki palsu trans-femoral yang hanya berjumlah RM225,730 tanpa GST. SD1 juga memberi keterangan I bahawa Endolite Linx tidak sesuai untuk responden mengambil kira tahap aktiviti dan hipertensi yang akan menyebabkan ruam dan jangkitan kulat pada kulit, dan adalah tidak sesuai untuk membolehkan responden kembali kepada kerja asalnya yang akan memerlukannya untuk memanjat tangga, berkerja di luar dalam suhu sederhana atau panas dan selalu terkena air.

Diputuskan, membenarkan rayuan perayu dengan kos sebanyak RM8,000 dan mengurangkan jumlah yang diawardkan oleh mahkamah sesyen dengan 1/3 berkaitan dengan kemungkinan, jatuh bangun kehidupan dan bayaran yang dipercepatkan:

(1) Adalah merupakan dapatan hakim mahkamah sesyen terpelajar memilih Endolite Linx adalah satu dapatan fakta. Mahkamah tidak akan memperkecilkan kelebihan hakim mahkamah sesyen yang mendengar keterangan kedua-dua pakar memberikan keterangan. Lanjutan itu, hakim mahkamah sesyen tidak kagum dengan kredibiliti salah seorang saksi pakar. Mahkamah tidak mendapati apa-apa alasan yang dikemukakan yang memerlukan campur tangan dengan dapatan hakim mahkamah sesyen yang terpelajar bahawa kaki palsu Endolite Linx adalah kaki palsu yang betul dan sesuai untuk responden (lihat perenggan 15 & 19).

(2) Responden yang dalam usia pertengahan lima puluhan dan dalam jumlah yang diawardkan termasuk faktor kos beberapa penggantian bahagian komponen untuk tempoh 16 tahun dan juga mengambil kira inflasi, peningkatan kos dan kejatahun nilai wang yang merupakan faktor yang perlu dipertimbangkan dalam menilai jumlah kerugian yang perlu diawardkan. Namun tiada sebab bahawa diskaun tidak boleh diberikan. Dalam pengalaman undang-undang common, adalah diiktiraf bahawa perkara yang tidak dijangka akan berlaku dan boleh mewujudkan situasi yang menyebabkan pampasan yang diberikan terlebih. Amaun yang diawardkan tidak berkaitan dengan tuntutan di bawah s 7 Akta Undang-Undang Sivil dan tiada sebab mengapa satu diskaun untuk kemungkinan, jatuh bangun kehidupan dan pembayaran awal tidak boleh digunapakai. Alasan yang dikemukakan oleh hakim mahkamah sesyen tidak dalam keadaan ini membolehkan pengenepian kebiasaan memberikan diskaun untuk kemungkinan, jatuh bangun kehidupan dan pembayaran yang dipercepatkan (lihat perenggan 22–23, 26 & 29).]

Notes

For cases on damages in general, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 221–381.

Cases referred to

Ang Yee Cheng & Anor v Ang Siang Hock (person under disability suing through Koh Beng Guek, litigation representative) [2016] 9 MLJ 238, HC (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233, SC (refd)

Clarke v Edinburgh and District Tramways Co (1919) SC 35, HL (refd)

Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her

father and next friend, Chung Shan Yong) & Ors and another appeal [2013] 4 MLJ 785, CA (refd)
Lai Wee Lian v Singapore Bus Service (1978) Ltd [1984] 1 MLJ 325, PC (refd)
Montgomery v Lanarkshire Health Board (General Medical Council intervening) [2015] 2 All ER 1031, SC (refd)
Noraini bte Omar (wife of the deceased, Ku Mansur bin Ku Baharom and mother of the deceased, Ku Amirul bin Ku Mansor) & Anor v Rohani bin Said and another appeal [2006] 3 MLJ 150, CA (refd)
Raji Transport Sdn Bhd & Anor v Idayu binti Zulkafli [2004] MLJU 36; [2004] 5 CLJ 479, HC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
Soton bin Bili & Anor v Khajijah binti Led & Ors [2008] 8 MLJ 521; [2008] 9 CLJ 304, HC (refd)
Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor and another appeal [2018] 2 MLJ 322, CA (refd)
Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512, CA (refd)
Wong Kuan Kay v Rohaizad Othman & Anor; Majlis Perbandaran Johor Bahru Tengah (Third Party) & Another Appeal [2015] 4 CLJ 902, CA (refd)

Legislation referred to

Civil Law Act s 7

P Nirmala (Kanaga, Suresh & Co) for the appellant.
Ranizan bin Mokhtar (Ranizan Abdullah & Assoc) for the respondent.

Darryl Goon JC:

[1] This was an appeal against the quantum of damages awarded by the sessions court against the appellant in a judgment handed down on the 27 March 2017. The appeal was confined to the award of the sum of RM1,369,883.60 by the learned sessions court judge in respect of a prosthesis for the respondent. The other sums awarded as damages were not challenged.

BACKGROUND

[2] In the afternoon of the 31 May 2017, while riding on his motorcycle, the respondent, who was in his mid-fifties, met an accident with a motorcar driven by the appellant. As a consequence of the accident, the respondent suffered severe injuries resulting in his left leg being amputated above the knee.

[3] Having found liability on the part of the appellant, the sessions court then addressed the issue of damages. Germane to the appeal at hand was the cost and expense of an appropriate prosthesis for the respondent.

THE EVIDENCE OF THE EXPERTS

[4] Two experts were called to testify as to the appropriate prosthesis for the respondent. The expert who was called by the respondent to testify was one Cik Nadzirah bt Abdul Razak. The appellant's expert was one Mr Santosh Kumar Prasad.

[5] Cik Nadzirah bt Abdul Razak, who was a clinical prosthetist & orthotist with Endolite Asia Sdn Bhd, testified as SP4. SP4 testified that she had examined the respondent on 31 October 2017 and pursuant thereto, a prosthetic report dated 1 November 2017 (exh P14) was prepared. SP4 testified that the respondent fell within, what she referred to as, a 'category 3 amputee'. She explained that there are five categories of amputees and a category 3 amputee (or 'level K3 amputee') was one who is capable of multiple speeds of walking with a near normal life style. Having examined the respondent, SP4 recommended a trans-femoral prosthesis which comprises a suspension system, socket, knee rotator, knee joint, various above the knee ('AK') adaptors, foot cover and cosmetic cover. A trans-femoral prosthesis is an artificial limb that replaces a leg missing from above the knee and it comprises those several component parts mentioned.

[6] As for the appropriate trans-femoral prosthesis, SP4 recommended the Endolite Linx for the respondent. SP4 testified that the, 'Endolite Linx knee and foot synchronize with each other and adjust alignment in a dynamically changing environment, similar feature as how the biological knee and foot coordinate with the brain. Microprocessor controlled knee and foot system will help Mr Zakaria bin Awang to walk much better than using the mechanical prosthetic components in terms of gait performances and security'. SP4 explained the functions of the various part of the recommended prosthesis and testified that in the case of the expected usage by the respondent, whom she considered an active amputee, the component parts that make up the prosthesis would have a life span of three years. In her recommendation, SP4 catered for the future costs of several replacements of the various components of the prosthesis allowing as well, for a 3–5% increase in price over the years. When quantified, the total amount to cater for the recommended prosthesis was RM1,364,001.64, inclusive of goods and services tax.

[7] Mr Santosh Kumar Prasad who testified as SD1 was a certified prosthetist and orthotist. He was a senior consultant and clinical head cum workshop manager with Pusat Anggota Tiruan Central Sdn Bhd. SD1 also prepared a prosthetic report for the respondent and, like SP4, he placed the respondent as a category 3 amputee or a level K3 amputee (high impact level). This category, he testified, denotes an amputee with the ability or potential for ambulation with variable cadence typical of the community ambulatory who

A has the ability to traverse most environmental barriers and may have vocational, therapeutic or exercise activity that demands prosthetic utilisation beyond simple locomotion.

B **[8]** SD1 prescribed the Ossur Total Knee 2000 for the respondent. This was also a trans-femoral prosthetic which comprises several component parts. Compared to the Endolite Linx, the prosthesis recommended by SD1 would cost only RM225,730 (without GST). SD1 explained that the Endolite Linx was among the most expensive of prosthesis and it uses microprocessors. SD1 however opined that the Endolite Linx was not suitable for the respondent. He C testified that the respondent, having regard to his activity level and hypertension, will have excessive sweating and this can cause rashes and give rise to fungal infection on the skin. The reason given was because the Endolite Linx uses a silicone liner which does not have good heat dissipation properties. D SD1 also testified that the Endolite Linx was not suitable to enable the respondent to return to his previous job which would require him to climb ladders, work outdoor, work in warm or hot temperature and have regular contact with water. He also testified that the Endolite Linx prosthesis weighed 2.5kg below the knee while the prosthesis he recommended was only 1.5kg E below the knee. In SD1's view, if the microprocessor in the Endolite Linx fails, repairs would be expensive and would take time, as repairs cannot be done in Malaysia. SD1 testified that Ossur Total Knee 2000 was also distributed by Endolite Asia.

F DECISION OF THE SESSIONS COURT

[9] The learned sessions court judge, in his judgment, carefully considered and analysed the differences between the two prostheses. A table with the differences was also set out in his grounds of judgment.

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[10] Of the experts, the learned sessions court judge found SP4 to be honest and open about the limitations of the prosthesis she recommended. He also found that SP4 had given careful consideration to the respondent's condition, H to the extent of taking into account his social standing as well. SP4 was also found to be well prepared when giving her testimony and had demonstrated the workings of the prosthetic she recommended.

[11] In contrast the learned sessions court judge was of the view that SD1 I sought to hide the limitations of the prosthesis he recommended and that he was not truthful about the function of the 'geometric locking system'. The learned sessions court judge was also of the view that SD1 had not carried out a careful physical study as to why the prosthesis he recommended was better than the prosthesis recommended by SP4.

[12] In conclusion, the learned sessions court judge found that the prosthesis recommended by SP4 was more suitable for the respondent. In his grounds of judgment, the learned sessions court judge set out at length the reasons for coming to this conclusion. Hence, the award of the sum of RM1,364,001.64 recommended by SP4. As for the reasons given, they were all clearly set out in detail in the grounds of judgment of the learned sessions court judge, and I do not see that they warrant being reproduced in their entirety.

[13] However, in the exercise of what is asserted as his discretion, the learned sessions court judge decided against giving any discount for the vicissitudes of life in respect of the sum of RM1,364,001.64 awarded. The learned sessions court judge held that whether such a discount should be given is a matter of discretion, citing the decision of David Wong Kak Wah J (as His Lordship then was) in *Soton bin Bili & Anor v Khajijah binti Led & Ors* [2008] 8 MLJ 521; [2008] 9 CLJ 304.

[14] The reason given for not imposing a discount on the sum awarded was that the recommended prosthesis would cater for the respondent for the next 16 years. In the learned sessions court judge's view, the costs of the replacement component parts of the prosthesis will rise, over time, due to inflation and tax. Having regard to the testimony of SP4, the costs of the components for the prosthesis may rise by as much as 3–5%. The decision of the court in *Raji Transport Sdn Bhd & Anor v Idayu binti Zulkafli* [2004] MLJU 36; [2004] 5 CLJ 479 was referred to as authority that inflation and the fall in value of money should be taken into account when assessing damages. In addition, the learned sessions court judge was of the view that there was no evidence that the respondent had any life threatening condition such as would shorten his life span.

FINDING FOR THE ENDOLITE LINX

[15] The learned sessions court judge's finding in favour of the Endolite Linx was clearly a finding of fact. This court will not presume to belittle the advantage the learned sessions court judge had in having heard the testimonies of the experts and having seen them both testify. In addition, the learned sessions court judge had clearly weighed and assessed the proposed prostheses and made a finding that cannot be said to be plainly wrong or one that was arrived at because he had fundamentally misdirected himself. In addition, quite apart from the assessment of the prostheses themselves, the learned sessions court judge was also clearly not impressed with the credibility of one of the experts.

[16] Although quoted in numerous cases (see *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 at

pp 575–576; [2003] 1 CLJ 585 at p 598) the words of Lord Shaw of Dunfermline in *Clarke v Edinburgh and District Tramways Co* (1919) SC 35 at p 36 (HL) is apt for the purposes of this case and warrants repeating:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the trial judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them or heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice, in the ordinary case, things are more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them, which can never be reproduced in the printed page. What in the circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: am I — who sit here without the advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[17] Equally pertinent are the observations of the Court of Appeal in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 at pp 398–399; [1996] 4 CLJ 545 at p 550, that:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[18] More recently in *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] 2 All ER 1031 at p 1055, Lord Kerr and Lord Reed in their joint judgment of the UK Supreme Court stated:

> [97] This court has reiterated in a number of recent cases, including *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 that appellate courts should exercise restraint in reversing findings of fact made at first instance. As was said in *Henderson*'s case at para [67]:
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> > in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of

relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

[19] This court does not find any ground disclosed that would warrant interference with the finding of the learned sessions court judge that the Endolite Linx trans-femoral prosthetic was the correct and appropriate prosthetic for the respondent.

Should there have been a discount?

[20] However, was the learned sessions court judge correct in not applying a discount for contingencies and the vicissitudes of life in this case, and for the reasons given? In *Soton bin Bili & Anor*, His Lordship David Wong Dak Wah J (as His Lordship then was) stated that:

> [6] In respect of the cost of prosthesis of RM108,730, Ms Derbe Tang (Ms Tang) submitted that the learned sessions court judge had erred in not reducing the amount of RM108,730 by deduction for contingencies, vicissitudes of life and/or taking into account the accelerated payment. She relied on the case of *Cheng Bee Teik & Ors v Peter Selvaraj & Anor* [2005] 4 MLJ 301 and *Bujang bin Mat & Anor v Lai Tzen Hai & Anor* [2004] 6 MLJ 376. *Whether or not a 1/4 deduction should be given is a matter of discretion on the part of the judge and the circumstance of each individual case*. (Emphasis added.)

[21] In *Soton bin Bili & Anor* the reasons given as to why the learned sessions court judge did not make the 1/4 deduction were:

1. The foot needs to be changed every two years at the cost of RM880 per change.
2. Socket needs to be changed at least once at the cost of RM800.
3. Netting needs to be changed every six months at the cost of RM25 per change.
4. The life span of Modular III is only six years.

The plaintiff in *Soton bin Bili & Anor* was in his thirties.

[22] In this case, the respondent is in his mid-fifties. It is important to note that included in the sum of RM1,364,001.64 awarded, were the costs of several future replacement of component parts that would cater for the prosthesis for a period of 16 years. The reasons given by the learned sessions court judge namely, inflation, rising costs and the fall in value of money are in fact factors that are to be taken when assessing the quantum of damages to be awarded. In *Raji Transport Sdn Bhd*, Low Hop Bing J (as His Lordship then was) stated as follows at p 483 of the report:

The considerations of inflation and enhanced cost of living over a period of more than two decades since the decision in *Lau Ee Ee*, should be given proper weight in the assessment of quantum of damages in personal injury litigation. Indeed, it is instructive to note that our courts have also moved ahead with the times in these areas. Chan Shick Chin, a very senior member of the Bar, in his concise and well-researched book on *Personal Injury, Law, Practice and Precedents* published by MLJ in 2001 at p 47 wrote:

> vii Fall in value of money
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> The fall in the value of money must be taken into account in the use of comparables so that an award which is eventually given would be reflective of the current value of money: 162: *Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor* [1995] 4 CLJ 317.

The judgment of Abdul Malik Ishak J in *Abdul Ghani*, supra, is in line with the trend in Singapore where Choor Singh J in delivering the judgment of the Court of Appeal also considered changes in the value of money, the decrease in the purchasing power of the dollar there or the increase in the cost of living over the years, as relevant factors in the assessment of damages. A similar approach was adopted by Yusoff J in *Wong Tin Vui v Patrick Midok & Anor* [1975] 2 MLJ 260. I am of the view that these time-honoured principles have become entrenched and settled principles which should continue to apply as they are in keeping with economic reality.

[23] Indeed, the probable rise in the costs of component parts in the future of 3–5% was taken into account by the learned sessions court judge. However, after taking into account these and other factors and upon the quantum to be awarded having been arrived at, ought not contingencies and the vicissitudes of life be then taken into account and a discount afforded? There is, to my mind, no reason why in principle they should not, in the circumstances of this case. If future rise in costs, which is probable, would suffice to negate the allowance of a discount for contingencies and vicissitudes of life, the very principle of giving such a discount would be rendered otiose. Contingencies and vicissitudes of life, by their very nature, are such that what they might actually be are often beyond predictability, save for the fact that they exist and they ought reasonably to be taken into account. In the experience of the common law, it is a recognition that unforeseen events do occur in life and they may occur such as would result in an over compensation. The physical or mental condition of an individual may also deteriorate over time such that the facilities that are intended to cater for his future use by the damages awarded, may be rendered redundant.

[24] In this case the respondent is 57 years of age and there was evidence that the respondent was hypertensive. There was also evidence that he had gout and was arthritic although it was argued by learned counsel for the respondent that

these were not raised below. Nevertheless, upon the evidence, there existed circumstances that supported applying the discount rather than circumstances justifying its non-application.

[25] Over and above contingencies and vicissitudes of life, the fact additional amounts of money had been included in the award to take into account the costs of replacing components in the future, had thereby introduced into the equation the element of accelerated payment in respect of which there also exists a basis for the imposition of a discount (see *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] 1 MLJ 325, *Ang Yee Cheng & Anor v Ang Siang Hock (person under disability suing through Koh Beng Guek, litigation representative)* [2016] 9 MLJ 238; *Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal* [2013] 4 MLJ 785).

[26] It bears mentioning that as the amount awarded is not in respect of a claim under s 7 of the Civil Law Act, there is no reason why a discount for contingencies, vicissitudes of life and accelerated payment may not be applied (see *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233, *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512; *Noraini bte Omar (wife of the deceased, Ku Mansur bin Ku Baharom and mother of the deceased, Ku Amirul bin Ku Mansor) & Anor v Rohani bin Said and another appeal* [2006] 3 MLJ 150).

[27] In *Wong Kuan Kay v Rohaizad Othman & Anor; Majlis Perbandaran Johor Bahru Tengah (Third Party) & Another Appeal* [2015] 4 CLJ 902 at pp 912–913, Mohd Zawawi Salleh JCA (as His Lordship then was) delivering the judgment of the Court of Appeal stated, in compelling terms, as follows:

> [38] ... the courts have, as a matter of practice, made reduction for contingencies to cater for accelerated receipt, contingencies and all the variables and uncertainties with regard to the future. In *Klar, Linden, Cherniak & Kryworuk, Damages and Remedies in Tort* (Carswell, 1995), the authors stated the following at p 56:
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> > This head of damages (costs of future care) is the post-trial equivalent to that dealing with expenses incurred prior to trial. It is commonly known as costs of future care and covers all expenses which would have been incurred but for the injury. It includes the future cost of medical treatment and other expenses required to provide the plaintiff with the lifestyle enjoyed prior to the injury. Generally, the costs of future care take into consideration the following factors: i) the costs of care; ii) the duration of the expense; iii) contingencies; iv) the discount rate; and v) the overlap factor.
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> [39] The authors further stated in p 76 that:
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> > ... Contingencies affecting damages for cost of future care relate to the duration of the expense and possibility that the plaintiff will not require the anticipated level of care for the estimated length of time, for example, the possibility that the

plaintiff's deteriorating condition would require institutional rather than home care.

[40] Therefore, the deduction of 1/3 for contingencies by the learned Sessions Court Judge relate essentially to the duration of expense and the possibility that the plaintiff will not require the anticipated level of care for the estimated length of time. To vary an award by the value of the chance that certain contingencies may occur is to assure neither over-compensation nor under-compensation, depending on whether or not the event occurs. In light of the considerations we have mentioned, we are of opinion that it would be reasonable to allow a discount for contingencies. Further, this is a normal and recognised approach originating from common law. In the case of *Bujang Mat & Anor v Lai Tzen Hai & Anor* [2004] 4 CLJ 127, the plaintiff was 22 years old at the time of accident and had suffered from severe brain damage and had become vegetative. The learned Sessions Court Judge made no deduction for contingencies when making an award in respect of costs of nursing care. In reviewing this issue, Clement Skinner J (as he then was) held that to arrive at the loss, the learned Sessions Court Judge should have made an allowance of 1/3 for contingencies. The cases that have adopted this approach are *Tan Ah Kau v The Government of Malaysia* [1997] 2 CLJ Supp 168; [1997] 2 AMR 1382, *Ng Chun Loi v Hadzir Yunus & Ors* [1993] 1 CLJ 323.

[28] Even if indeed it be that the imposition of a discount in respect of contingencies, vicissitudes of life and accelerated payment is an exercise of discretion, and appellate courts should be slow to interfere with the exercise of discretions, there is nevertheless good authority that an appellate court may do so if the exercise of discretion is upon wrong principles. In *Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor and another appeal* [2018] 2 MLJ 322 at p 353 Abdul Rahman Sebli JCA stated as follows:

[96] The correct approach to be adopted by an appellate court in dealing with the exercise of such discretion has been explained by Lord Guest delivering the judgment of the Privy Council in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228, a decision on appeal from Malaysia, in the following terms at p 229:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* per Lord Wright at p 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam*).

[97] There are, therefore, two situations where the exercise of the discretion can be assailed on appeal:

(a) where the discretion has been exercised on a wrong principle and should have been exercised in a contrary way; or

(b) where there has been a miscarriage of justice occasioned by the exercise of the discretion.

[29] In the circumstances of this case, this court is of the view that a discount ought to be applied to the amount of RM1,364,001.64 awarded by the learned sessions court in respect of contingencies, vicissitudes of life and accelerated payment. The reasons proffered by the learned sessions court judge, with respect, do not in the circumstances of this case justify a waiver of the well-established practice of affording a discount for contingencies, vicissitudes of life and accelerated payment.

CONCLUSION

[30] In light of the forgoing, the appellant's appeal was allowed and the amount of RM1,364,001.64 awarded by the learned sessions court reduced by 1/3 in respect of contingencies, vicissitudes of life and accelerated payment. Having heard submissions from counsel for the parties, costs to the appellant was awarded in the sum of RM8,000.

Appellant's appeal allowed with costs of RM8,000 and amount awarded by sessions court reduced by 1/3 in respect of contingencies, vicissitudes of life and accelerated payment.

Reported by Izzat Fauzan